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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO BARRERA GARCIA, JR.,

Defendant and Appellant.

F077002

(Super. Ct. No. 1497193)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Linda A. McFadden, Judge.

Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, R. Todd Marshall, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Meehan, J. and Snauffer, J.

Appellant Antonio Barrera Garcia, Jr., pled guilty to driving under the influence of alcohol causing injury (Veh. Code, § 23153, subd. (a)/count 1), driving with a blood-alcohol content of 0.08 percent or greater causing injury (Veh. Code, § 23153, subd. (b)/count 2), and driving while his driving privilege was suspended (Veh. Code, § 14601.1, subd. (a)/count 3), a misdemeanor. Garcia also admitted a great bodily injury enhancement (Pen. Code, § 12022.7, subd. (a))¹ in counts 1 and 2 and allegations in those counts that his blood-alcohol content was 0.15 percent or higher (Veh. Code, § 23578).

On May 7, 2018, Garcia's appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 that raised no issues and asked this court to independently review the record. However, on October 16, 2018, this court sent a letter to the parties directing them to brief certain issues including whether the court misunderstood its discretion when it sentenced Garcia. Because we conclude the court misunderstood its sentencing discretion, we affirm the judgment of conviction, vacate the sentence and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On November 30, 2015, in Modesto, at approximately 1:50 a.m., Garcia was driving approximately 50 miles an hour when he ran a stop light and hit a car driven by D'Jae Folse. After the collision, Garcia managed to get out of his car through a window. As an officer tended to Folse, another officer noticed that Garcia showed signs of intoxication and handcuffed him. As the officer placed Garcia in the back of a patrol car, he noticed Garcia's eyes were extremely red and watery, he was disoriented, his speech was heavily slurred, and he emitted an odor of alcohol. Additionally, Garcia spontaneously stated that he "messed up" because he had been drinking. A test on blood

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

drawn from Garcia at 3:30 a.m. disclosed that his blood- alcohol content was then 0.25 percent.

Folse suffered a severed aorta that required the insertion of a mesh sleeve to keep his aorta intact, a broken finger, an orbital fracture to the right side of his face, ten broken ribs, a fractured pelvis, a collapsed lung, a torn diaphragm, a ruptured eardrum and a cut on his right eyebrow that required stitches.

On April 17, 2017, the Stanislaus County District Attorney filed an information that charged Garcia with the charges and other allegations to which he pled.

On November 14, 2017, Garcia entered his plea in this matter.

On January 17, 2018, at appellant's sentencing hearing, the court rejected the defense's request for a mitigated term on counts 1 and 2, stating:

“And I have thought, [defense counsel], about a lower term because your client did plead at an early stage, but, I think, for varying from a lower term, to provide the defendant with a lower term, I would have had to find that the circumstances in mitigation outweigh the circumstances in aggravation, and that's the way the law works. I don't think I can do that in this case, and I don't find that the circumstances in mitigation outweigh the circumstances in aggravation here. The circumstances in aggravation, if anything, almost outweigh the circumstances in mitigation, and the mitigating factors are I do believe that your client is truly remorseful. [¶] ... [¶] This is a difficult case because I see you know what took place here is going to have an impact on your family as well, but I just don't think that legally I can find that the circumstances in mitigation outweigh the circumstances in aggravation given everything that I have read and viewed here.”

The court, without objection from defense counsel, then sentenced appellant to an aggregate term of five years: the middle term of two years on count 1, a three-year great bodily injury enhancement on that count, an identical, stayed term on count 2, and time served on count 3.

Garcia's appellate counsel has filed a brief that summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the

record. (*People v. Wende, supra*, 25 Cal.3d 436.) Garcia has not responded to this court's invitation to submit additional briefing. However, in our letter to the parties we directed them to brief several issues, including whether the court was required to weigh the circumstances in aggravation against the circumstances in mitigation in determining which of three terms to impose (§ 1170, subd. (b)), whether the court misunderstood its discretion when it stated that it had to find that the mitigating circumstances outweighed the aggravating circumstances in order for it to impose the mitigated term, whether Garcia forfeited this issue, and if so, whether defense counsel provided ineffective representation by his failure to preserve this issue by interposing an appropriate objection.

DISCUSSION

The Trial Court Misunderstood Its Sentencing Discretion

The parties agree, as do we, that the court was not required to weigh aggravating and mitigating circumstances in deciding which of three terms to impose pursuant to section 1170, subdivision (b) and that it did not have to find the mitigating circumstances outweighed the aggravating circumstances for it to impose the mitigated term. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846-847 [The trial court is required to specify reasons for its sentencing decision, but not to cite "facts" that support its decision or to weigh aggravating and mitigating circumstances].) Respondent, however, contends: (1) Garcia forfeited this issue by his failure to object in the trial court; (2) the court exhibited only a minor misunderstanding of its discretion that did not amount to an abuse of discretion requiring remand; and (3) Garcia did not suffer any prejudice because the court made it clear the middle term was the appropriate term and the victim's injuries and the court's concern with Garcia's alcohol relapse and recidivism demonstrate that the court would not impose the mitigated term. Thus, according to respondent, remand for resentencing is unnecessary. We disagree.

The Court's Misunderstanding of Its Sentencing Discretion Prejudiced Garcia

Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Further, *People v. Scott* (1994) 9 Cal.4th 331, the case respondent cites in support of his forfeiture argument, merely states that “complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*Id.* at p. 356.) The issue, here, involves the trial court’s failure to exercise its sentencing discretion, not the manner in which the court exercised that discretion. Thus, this issue has not been forfeited on appeal.

“ ‘A ruling otherwise within the trial court’s power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]’ [Citation.] ‘Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]’ [Citation.] Where, as here, a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination.” (*People v. Downey* (2000) 82 Cal.App.4th 899, 912; accord, this court’s opinion in *People v. Leon* (2016) 243 Cal.App.4th 1003, 1023.)

However, the court’s misunderstanding of its discretion must be affirmatively reflected in the record. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 945.) Further, “[i]f the record shows that the trial court would not have exercised its discretion [in the defendant’s favor] even if it believed it could do so, then remand would be an idle act and is not required.” (*People v. Sanders* (1997) 52 Cal.App.4th 175, 178, disapproved on another ground in *People v. Fuhrman, supra*, at p. 947, fn. 11.)

The comments quoted above clearly demonstrate a significant misunderstanding by the court of its sentencing discretion because they show that it erroneously believed it could not impose the mitigated term unless it found that the mitigating circumstances outweighed the aggravating circumstances. They also show that the court seriously considered imposing the mitigated term but felt constrained to impose the middle term because the “aggravating circumstances, if anything, almost outweighed the circumstances in mitigation.” Thus, the court’s comments refute respondent’s contention that the court’s misunderstanding of its discretion did not prejudice Garcia. They also refute respondent’s contentions that the court felt the middle term was appropriate and that the court would not have imposed the mitigated term because of the injuries to the victim and the other concerns the court had. Accordingly, we will remand the matter to the trial court for it to properly exercise its discretion in determining which term to impose.²

Further, following an independent review of the record, we find that with the exception of the issues discussed above, no other reasonably arguable factual or legal issues exist.

DISPOSITION

The sentence is vacated and the matter remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

² Garcia contends defense counsel provided ineffective representation by his failure to object to the court’s comments that indicated it misunderstood its sentencing discretion. This contention is moot in light of our decision to remand the matter for resentencing.